

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
UNITED STATES OF AMERICA,  
:  
Plaintiff,  
:  
-and-  
:  
THE VULCAN SOCIETY, INC., for itself and on behalf of  
its members, and MARCUS HAYWOOD, CANDIDO  
NUÑEZ and ROGER GREGG, individually and on behalf  
of a class of all others similarly situated,  
:  
Plaintiffs-Intervenors,  
:  
-against-  
:  
THE CITY OF NEW YORK,  
:  
Defendant.  
:  
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**SPECIAL MASTER'S  
REPORT NO. 9**

**07-cv-2067 (NGG)(RLM)**

MARY JO WHITE, Special Master.

The Special Master submits this report pursuant to paragraph 4 of the Court's June 1, 2010 Order Appointing Special Master (the "Appointment Order"). (Dkt. No. 448, ¶ 4.) The Appointment Order requires the Special Master to submit a report at least every 90 days after the parties begin the joint development of a new firefighter eligibility exam (the "New Test"). The Special Master's last report was submitted on December 28, 2011. (Dkt. No. 785.) This report covers developments since the December 28th report through the beginning of the administration of the New Test.

## **I. Progress Towards Development of the New Test**

As previously reported to the Court, the current project plan includes six milestones: (i) job analysis; (ii) test development, which encompasses test design, development of exam content, content validation and pilot testing, criterion-related and construct validation, and development of various test forms and an equivalency study; (iii) test administration; (iv) analysis and scoring; (v) computation of the final test results; and (vi) preparation of the final technical report.<sup>1</sup> At the Special Master's instruction, the parties certify in writing at various points across these milestones that the test development process should proceed to the next phase in the project plan. To date, all parties – the United States, the Vulcan Society and the City – have agreed that the development process should proceed.<sup>2</sup>

### **A. Test Development**

At this juncture in the test development process, the experts have developed alternate test forms for the computer-based test and have completed the equivalency study

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<sup>1</sup> The Special Master's prior reports provide an overview of the validation methods and of the equivalency study. (*See* Dkt. Nos. 691, 739, 785). The equivalency study is also described below. *See infra* at 3.

<sup>2</sup> To facilitate this progress, the Special Master continues to hold scheduled standing weekly telephonic conferences with the parties. These conferences are held (or not) based on the Special Master's assessment of the need to convene the parties. Since her last report, additional conferences were held on January 4th, 11th, 18th, 20th, 24th, and 31st; February 7th, 14th, 25th and 29th; and March 6th, 13th, 14th and 20th. At the Special Master's direction, certain of the conferences were conducted by her partner, Mary Beth Hogan. In addition, on February 24th the Special Master hosted a seventh joint expert-counsel meeting at the offices of her law firm. The experts also continue to hold a standing weekly telephonic (sometimes virtual) conference with each other. Since the Special Master's previous report, the experts have held telephonic and/or virtual conferences on January 3rd, 9th, 20th, 25th, and 27th; February 2nd, 6th, 10th, and 13th; and March 1st, 7th, 13th, 14th, and 23rd. In addition, they have held in-person meetings on January 18th and February 23rd.

to ensure that those forms are equivalent in substance and difficulty to each other and to the experimental form. The alternate test forms are currently being used in the administration of the New Test to the job candidates.

1. Development of Various Test Forms and Equivalency Study

As previously reported to the Court (Dkt. No. 785 at 4), the experts developed several alternate test forms to be used in the administration of the exam to the job candidates. Developing alternate forms was necessary to ensure the security of the exam. In January and February 2012, the experts subjected the alternate forms to methods generally accepted by psychometric experts to ensure that the forms were equivalent in substance and difficulty to the experimental form that the firefighter incumbents took during the criterion study. This process involved administering the alternate test forms and the experimental form to a sample of several hundred people who were recruited to participate in this study and then performing statistical analyses to compare the new forms of the exam to the experimental form utilized in the criterion study.

Based on the results of the equivalency study, the experts for each of the parties agreed that these new forms were equivalent to the validated form, and to each other, in all material respects. The alternate test forms are currently being used in the administration of the New Test to the job candidates.

2. Tutorials in Connection with Test Administration

The experts developed a web-based tutorial that candidates have been able to use to familiarize themselves with taking a computer-based test and to understand the type of content and questions included on the New Test. A preliminary version of this tutorial was

completed in January 2012 and was made available to candidates on the Department of Citywide Administrative Services (“DCAS”) website. The tutorial was updated with additional content on February 15, 2012. It will remain available to candidates throughout the remainder of the test administration period. Candidates were informed of the tutorial through the Notices of Exam, FDNY and DCAS websites, and in the test admission notices that they received; candidates were subsequently notified via email that additional content was added to the tutorial.

The Fire Department and the Vulcan Society also have developed and offered in-person tutorial programs to candidates. Candidates are being scheduled for the Fire Department’s tutorial sessions through phone calls to all candidates by the City’s Office of Recruitment and Development.

3. Additional Communications to Candidates in Connection with Test Administration

In late January, admission notices were sent to candidates advising them of the time, date and location of their testing sessions.<sup>3</sup> The admission notices also informed applicants that if they are unable to take the test on their assigned day, time and/or location, they may ask to reschedule their test date, time and/or location. Rescheduling is subject to the availability of open dates, times, and locations. A small number of candidates were erroneously scheduled for testing sites that were quite far from their homes. These candidates have been rescheduled and revised admission notices have been sent to them

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<sup>3</sup> Candidates have been assigned to twenty (20) testing centers, the majority of which are located in Brooklyn, Manhattan, and Queens, with additional sites to accommodate candidates in the northern suburbs, upstate New York, Connecticut, Philadelphia, and Boston.

with new test locations closer to their homes. In the weeks leading up to test administration, the City reached out to test candidates by phone and email in order to (1) schedule candidates for FDNY tutorial sessions, as noted in Section I.A.2 above; (2) remind candidates that they may reschedule their test date, time or location and/or request a duplicate admission notice should they need a replacement; (3) remind candidates of those items they may and may not bring to the test sites; and (4) encourage the candidates to take the New Test.

## **B. Test Administration**

The City began administering the New Test to applicants on March 15. To date, no significant logistical or security issues have arisen in connection with any of the testing sessions. Test administration is scheduled to conclude in mid- to late-April.

## **II. Updating *Amici*<sup>4</sup>**

As the Court is aware, since May 27, 2011, the Special Master has held teleconferences with the union representatives, Chief Gala of the FDNY and the parties in order to provide them with updates on the status of the test development effort.<sup>5</sup> Since our last report, and in lieu of additional teleconferences, the Special Master and the parties held an in-person conference with the Unions, Chief Gala and the Special Master's expert, Dr. Pittman, on March 1, 2012. At that conference, the *Amici* and Chief Gala were provided with additional information about the test development process that the Special

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<sup>4</sup> As noted, *Amici* are the UFOA and UFA. The meetings and conferences held with *Amici* prior to this report and prior to May 27, 2011 are described in the Special Master's prior reports.

<sup>5</sup> The experts have also participated in certain of these calls.

Master felt could appropriately be shared at that time. Additional teleconferences will be held after test administration on an as-needed basis.

### **III. Fees**

The Special Master and her law firm have agreed to work on a pro bono basis and accordingly, have not requested the payment of any fees throughout the test development process. The Special Master and her law firm seek reimbursement only for out-of-pocket expenses and disbursements, as well as the fees and expenses of the Special Master's expert consultant, Dr. Shane Pittman. On September 3, 2010 the Court approved the Special Master's Application for Approval of Proposed Budget for Special Master's Expert Consultant, which projected monthly fees of between \$7,000 to \$17,000. (Dkt. Nos. 516, 519.) The Special Master has submitted her expert's fees, which as reported in the Statements of Fees and Expenses, have fallen either under or within that projected range. Her expert, Dr. Shane Pittman, has received approved expenses and fees from the City for her fees and expenses through January 2012. (Dkt. No. 801.)

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The Special Master reiterates her thanks to the parties, experts, unions, and Chief Gala of the FDNY for their past and continued assistance and cooperation in this joint effort. All engaged in this process recognize both the importance and difficulty in developing a valid and legally compliant New Test that will serve to select new firefighters for the City. To do so requires the coordination, discussion, and consideration of the views and input of several interested parties. The Special Master is satisfied with the progress made to date by the parties and their experts towards developing the New Test.

Pursuant to the Appointment Order, the Special Master will submit her next report within 90 days from today. (Appointment Order, ¶ 4.)

/s/ Mary Jo White

Mary Jo White

Dated: March 27, 2012